

**IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)**

BETWEEN:

**ROGER SOUTHWIND, FOR HIMSELF, AND ON BEHALF OF THE MEMBERS OF  
THE LAC SEUL BAND OF INDIANS AND LAC SEUL FIRST NATION**

APPELLANTS

- and -

**HER MAJESTY THE QUEEN IN RIGTH OF CANADA,  
HER MAJESTY THEQUEEN IN RIGHT OF ONTARIO and  
HER MAJESTY THE QUEEN IN RIGHT OF MANITOBA**

RESPONDENTS

- and -

*(Continued on next page)*

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ASSEMBLY OF FIRST NATIONS**

*(Pursuant to Rule 42 of the Rules of the Supreme Court of Canada)*

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## **PART I –OVERVIEW AND STATEMENT OF FACTS**

1. The intervenor, the Assembly of First Nations (“AFN”), represents over 634 First Nations who have Treaties, inherent rights and title in their traditional territories. The AFN adopts the Appellant’s Statement of Facts and adds the additional facts as enumerated below.

2. First Nations across Canada have their own laws, languages, citizens, territories, and governance systems. First Nations hold the right to self-determination as Peoples’. Their relationships with the Crown are founded on inherent rights, as well as historic treaties, the numbered treaties, self-government agreements, and other arrangements.

3. The matter before this Court is a result of Canada having breached its constitutionally derived fiduciary duties to the Lac Seul First Nation (“LSFN”) via the unlawful flooding of over 11,000 acres of LSFN’s reserve land for a hydroelectric project in 1929 without addressing the undue hardship its actions would create for LSFN by depriving them of the use and benefit of such lands. These hardships were compounded by Canada’s failure to provide LSFN with reasonable compensation or replacement land.

4. The Appellants take the position that the lower Courts erred in the determination of the compensation owed to the Appellants as a result of Canada’s actions. Despite acknowledging the historical breach by Canada and the ongoing harms derived from its actions, the lower Courts relied on colonial jurisprudence which focused on restoring Canada to the position it would have been had it not breached its duties, effectively inferring a historical expropriation of the lands at the heart of this matter. They thereby gauged the level of compensation for the LSFN based on this hypothetical situation, versus addressing the impacts and loss actually incurred by the LSFN.

5. The AFN submits that at its core, the issue before this Court is the application of equitable principles to determine the appropriate compensation due to the LSFN, as guided by relevant and modern constitutional principles, particularly those flowing from the honour of the Crown, as well as international discourse. Only with due consideration being given to these principles can this Court ensure that First Nations are provided with an appropriate and just mechanism for redressing significant harms to First Nations arising as a result of Canada’s unlawful actions.

## **PART II – THE AFN’S POSITION ON THE QUESTION ON APPEAL**

6. The AFN submits that the Courts appropriately determined that Canada breached its fiduciary duties to the LSFN and that equitable compensation should be awarded. However, the

Courts erred in law in its assessment of equitable compensation for the LSFN's loss of the use and benefit of their lands as the lower Court's remedy ultimately failed to give due consideration to the special nature of the Crown-First Nations' relationship, the unique constitutional and First Nations legal principles which govern same, as well as applicable international discourse.

7. By relying on a hypothetical expropriation and creating a flowage easement to attempt to undo Canada's breaches, the lower Courts failed to respond to the constitutional grounded nature of Canada's fiduciary duties. The lower Courts did not provide a deterrent remedy nor did they in any way vindicate the value associated with Canada's constitutionally grounded fiduciary duties. Instead the Court engaged in revisionist history which effectively excused Canada's conduct. This is not a just or equitable result and is at odds with the principles of the honour of the Crown and Canada's commitments to reconciliation with First Nations. The AFN submits that the matter of compensation should be remitted to trial Judge with this Court's directions on the correct approach.

### **PART III –STATEMENT OF ARGUMENT**

8. The AFN submits that the lower Courts erred in law on their approach to the assessment of equitable compensation due to the LSFN as a result of Canada's breach of its fiduciary duties by unlawfully flooding the lands at issue, structuring compensation in relation to the lands at issue on a loss characterized as compensation for a flowage easement.<sup>1</sup> As the Crown's fiduciary obligations are constitutionally grounded, principles of equitable compensation must be read congruous with constitutional principles associated with the Crown-First Nations relationship. This includes giving due consideration of the interplay of the principle of the honour of the Crown, reconciliation, as well as the import of international norms such as those derived from the *United Nations Declaration on the Rights of Indigenous People*.

#### **A. Standard of Review: Errors of law in analysis of equitable compensation**

9. The AFN submits that the standard of review with respect to determination of the relevant equitable principles is reviewable on the standard of correctness, whereas the application of such principles to the facts is reviewable on a standard of palpable and overriding error.<sup>2</sup> A trial judge's damages or compensation assessment can be interfered with if it is tainted by an error in principle,

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<sup>1</sup> *Southwind v. Canada*, [2017 F.C. 906](#) at para at para 443 [“FC’s Reasons”], *Southwind v. Canada*, [2019 F.C.A. 171](#) [“FCA’s Reasons”].

<sup>2</sup> *FCA’s Reasons* at para 54, *Heritage Capital Corp. v. Equitable Trust Co.*, [2016 SCC 19](#), [2016] 1 S.C.R. 306 at para. 24.

or is unreasonably high or low.<sup>3</sup>

10. The AFN states that the lower Courts fell into error in interpreting and applying the relevant legal principles in this matter, particularly with respect to emphasizing what likely would have happened if the Crown had carried out its fiduciary duties lawfully, rather than focusing on what the LSFN lost as a result of the breach.

11. Finally, by relying on a hypothetical expropriation, the Courts have minimized the gravity of Canada's breaches, ignoring the role that deterrence and arguably vindication should play, especially in light of modern interpretations of the effect of the honour of the Crown and Canada's heightened emphasis on reconciliation. As a result, the lower Courts erred in assessing compensation for the flowage easement in the amount of \$14,582.16 in 1929.<sup>4</sup>

## **B. Constitutional Principles**

12. As noted by the Court in *Williams Lake*, the fiduciary obligation requires that the Crown's discretionary control be exercised in accordance with the standard of conduct to which equity holds a fiduciary, as embodied in the duties of loyalty, good faith and full disclosure. The standard of care to which a fiduciary is generally held to account in pursuit of the beneficiary's interest is that of "a man of ordinary prudence in managing his own affairs".<sup>5</sup> The lower Courts correctly identified that Canada breached its fiduciary duties to LSFN in failing to deal with LSFN's interests in their Reserve according to this standard.<sup>6</sup> As affirmed within the *FC*

13. 's *Reasons*, Canada's breaches of its fiduciary duties to LSFN were "inexplicable".<sup>7</sup>

14. An important distinction with respect to the Crown's fiduciary relationship with First Nations is the fact that it gives rise to and is grounded in the Crown's duty to act honourably in all dealings with First Nations.<sup>8</sup> As per this Court's decision in *Mikisew*,<sup>9</sup> the honour of the Crown is a foundational principle of Aboriginal law governing the relationship between the Crown and First Nations. In all dealings with First Nations, the Crown must act honourably and that nothing less is required if the reconciliation of the pre-existence of First Nations societies with the sovereignty of

<sup>3</sup> *Whitefish Lake Band of Indians v. Canada (Attorney General)*, [2007 ONCA 744](#) at para 28.

<sup>4</sup> *FC's Reasons* at para 391, 443.

<sup>5</sup> *Williams Lake Indian Band v. Canada (AANDC)*, [\[2018\] 1 S.C.R. 83](#) at para. 46.

<sup>6</sup> *FC's Reasons* at paras 391 and 443.

<sup>7</sup> *FC's Reasons* at paras 296-298.

<sup>8</sup> *R. v. Van der Peet*, [\[1996\] 2 SCR 507](#) at para. 24 ["*Van der Peet*"].

<sup>9</sup> *Mikisew Cree First Nation v. Canada (Governor General in Council)*, [2018 SCC 40](#), [2018] 2 SCR 765 at para. 21 ["*Mikisew*"].

the Crown is to be achieved.<sup>10</sup>

15. This Court has affirmed that the honour of the Crown recognizes the impact of the “superimposition of European laws and customs” on pre-existing First Nations societies. First Nations peoples were here first, and they were never conquered. Historical treaties were framed in that unfamiliar legal system, and negotiated and drafted in a foreign language. The honour of the Crown characterizes the “special relationship” that arises out of this colonial practice.<sup>11</sup>

16. As noted by this Court in *Manitoba Métis*, the honour of the Crown is engaged by s. 35 of the *Constitution Act, 1982*<sup>12</sup>. As s. 35 restrains the legislative power in accordance with the “high standard of honourable dealing”, it is therefore corollary of s. 35 that the Crown acts honourably in defining the rights it guarantees. Thus, the honour of the Crown is a constitutional principle.<sup>13</sup>

17. The AFN submits the fiduciary duties owed to LSFN by the Crown were at all times constitutionally grounded. This is supported by this Court’s decision in *Sparrow*, where it noted that the words “recognition and affirmation” in s. 35 incorporate the government’s responsibility to act in a fiduciary capacity and so import restraint on the exercise of sovereign power.<sup>14</sup>

18. The AFN submits that as the Crown’s fiduciary duties to the LSFN were constitutionally grounded, the correct approach to equitable compensation requires the court to uphold the constitutional principles and legal values associated with the Crown-First Nations relationship.

### **C. Principles of Equitable Compensation**

19. Further to the Ontario Court of Appeal’s decision in *Whitefish*, equitable compensation is equity’s “counterpart” to common law damages.<sup>15</sup> Its quantum is determined by analogy to trust law. Its aim includes compensation, the restoration of the plaintiff to the position that the plaintiff would have been in had the fiduciary not breached its duty. As addressed by this Court in *Canson*, it also critically serves to deter fiduciaries from abusing their powers.<sup>16</sup> The importance of the deterrent element was stressed in *Whitefish*, which noted that equitable compensation best further

<sup>10</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511 at para 17.

<sup>11</sup> *Manitoba Métis v. Canada*, [2013] 1 S.C.R. 623 at para 67 [“*Manitoba Métis*”].

<sup>12</sup> The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s. 35 [“s.35”].

<sup>13</sup> *Manitoba Métis* at para 69.

<sup>14</sup> *R. v. Sparrow* [1990] 1 S.C.R. 1075 at pg. 1109 [“*Sparrow*”].

<sup>15</sup> *Whitefish* at para. 48.

<sup>16</sup> *Canson Enterprises Ltd. v. Boughton & Co.* [1991] 3 S.C.R. 534 at pg. 547 [“*Canson*”].

the objectives of enforcement and deterrence, signalling the emphasis the court places on the Crown's ongoing obligation to honour its fiduciary duty and the need to deter future breaches.<sup>17</sup>

20. The fiduciary relationship has trust, not self-interest, at its core, and when a breach occurs, the balance favours the party wronged. Equity "is concerned not only to compensate the plaintiff, but to enforce the trust which is at the heart" of a fiduciary duty.<sup>18</sup> This places an onus on the court to presume the most advantageous use of the deprived asset in favour of the aggrieved party.<sup>19</sup>

21. With respect to the circumstances before this Court, the "trust" at the heart of the matter at hand is defined by Canada's unique relationship with First Nations, which is grounded in its duty to act honourably in all dealings with First Nations. This includes the corresponding constitutional nature of its fiduciary duties, as well as the trust like obligations associated with its discretionary control over reserves for First Nations' benefit, subject to the requirement that it protect First Nations pre-existing interests from being exploited by third parties.<sup>20</sup>

22. An important element of equitable compensation is its flexibility to respond to the particular circumstances associated with a breach of fiduciary duty. In *Canson*, the maxims of equity should be flexibly adapted to serve the ends of justice as perceived in our days. They are not rules that must be rigorously applied, but malleable principles intended to serve the ends of fairness and justice.<sup>21</sup> Equity's remedies, including compensation, must be moulded to meet the requirements of fairness and justice in specific situations. Not all fiduciary obligations are the same and equity should never be rigidly applied. Its doctrines must be attuned to different circumstances.<sup>22</sup>

23. The flexibility of equitable compensation and the ability to attune it to different circumstances is particularly relevant herein, whereby the Court is seeking to redress harms stemming as a result of the Crown breaching its fiduciary duty. The AFN submits that, further to the concept of the "living tree", an equitable remedy which seeks to redress the breach of a constitutionally grounded fiduciary duty should be progressively interpreted, to accommodate and address the realities of modern life<sup>23</sup>, which is notably in line with this Court's position in *Canson*,

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<sup>17</sup> *Whitefish* at para 57.

<sup>18</sup> *Canson* at pg 543.

<sup>19</sup> *Canson* at pg. 545.

<sup>20</sup> *Guerin v. The Queen*, [1984] 2 SCR 335 at para 383-384 [*Guerin*].

<sup>21</sup> *Canson* at pg 585-586.

<sup>22</sup> *Canson* at pg. 588.

<sup>23</sup> *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 at para. 22.



which addressed equities ability to adapt to serve the ends of justice “as perceived in our days”.<sup>24</sup>

24. The AFN submits that the lower Courts were therefore under an onus to progressively interpret the maxims of equitable compensation at play and ensure that the evaluation of compensation for LSFN lands correctly reflected modern realities and the ends of justice as perceived now, including the principles of reconciliation and ensuring that the ultimate result conformed with the honour of the Crown. This includes on emphasis on addressing the breach of trust at issue, to the benefit of LSFN. By failing to consider these principles and basing compensation on a theoretical expropriation and flowage easement, the lower Courts erred in law.

### **C. Deterrence & Vindication**

25. The AFN submits that the lower Courts particularly failed to address and weigh deterrence as an aspect of equitable compensation, despite the onus to consider it in the context of modern principles governing Crown-First Nations relations. Breaches of Canada’s fiduciary duties to First Nations must be strenuously deterred, particularly in light of the constitutional nature of said duties and given the power imbalance between the Crown and First Nations in respect of reserves.<sup>25</sup>

26. The lower Court noted that there is a presumption of deterrence as an element of an equitable remedy<sup>26</sup> and, in rejecting the appellants’ claim for punitive damages, concluded that the award of \$30 million was sufficient to deter further wrongdoing by the Crown.<sup>27</sup> The Federal Court of Appeal took no umbrage with this aspect of the *FC’s Reasons*.<sup>28</sup> As per the Federal Court:

Without guessing as to Canada’s intentions in acting the way it did, I am satisfied that restoring the plaintiffs to the position they would have been in but for Canada’s breach sufficiently meets the objectives of retribution, deterrence, and denunciation such that an award for punitive damages would not be proportionate in this instance.<sup>29</sup>

27. The AFN submits that the lower Courts erred in failing to substantially consider the deterrence component of equitable compensation, instead solely focusing on deterrence as an element of its discussion on punitive damages. As Canada breached its constitutionally grounded fiduciary duties, the AFN submits that the lower Courts were under an onus to progressively

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<sup>24</sup> *Canson* at pg. 585.

<sup>25</sup> *Guerin* at para 349.

<sup>26</sup> *FC’s Reasons* at para 239 and 245.

<sup>27</sup> *FC’s Reasons* at paras. 524-525.

<sup>28</sup> *FCA’s Reasons* at para 100.

<sup>29</sup> *FC’s Reasons* at para 525.

interpret the element of deterrence, to address the modern realities associated with Crown-First Nations relationships. This includes the application of general principles which govern Crown disputes with First Nations. These are applicable as a result of the constitutional nature of the Crown's fiduciary duty. As addressed by this Court in *Van der Peet*, equitable principles of compensation should be given generous and liberal interpretation and that any doubts or ambiguity associated therewith should be resolved in favour of First Nations.<sup>30</sup>

28. The AFN further submits that a progressive interpretation of equitable compensation must give due consideration for the elements as addressed in jurisprudence relating to claims for damages for breaches of the *Charter*<sup>31</sup> further to s. 24(1), in light of the fact that the Crown's fiduciary duties to LSFN were constitutionally grounded.

29. Like equitable compensation, compensation tied to *Charter* breaches include placing the applicant, in so far as possible, in the same position as if their right had not been infringed.<sup>32</sup> Deterrence of future breaches is also recognized as valid component of these types of claims. Deterrence has a societal purpose, aimed at influencing government behaviour in order to secure state compliance with the *Charter* in the future.<sup>33</sup>

30. The AFN submits that vindication, an important consideration associated with *Charter* breach jurisprudence, should have further informed the lower Court's review of equitable compensation as it pertained to the Crown breaches of its fiduciary duties, particularly on the issue of deterrence. This is supported by the aforementioned constitutional nature of the Crown's fiduciary duty to First Nations, the evolving societal emphasis on reconciling the divergent interest of First Nations and the Crown, and the inherent flexibility associated with equitable remedies. It further conforms to Canada's international commitments, as outlined herein below.

31. Vindication, in the sense of affirming constitutional values, has been recognized as a valid object of compensation for *Charter* breaches. It focuses on the harm a breach causes to the state and society as violations of constitutionally protected rights harm society as a whole as they impair public confidence and diminish public faith in the efficacy of the constitutional protection.<sup>34</sup>

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<sup>30</sup> *Van der Peet* at paras. 23-25.

<sup>31</sup> Part I of the *Constitution Act, 1982*. [Canadian Charter of Rights and Freedoms](#), s 7, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11

<sup>32</sup> *Vancouver (City) v. Ward*, [2010 SCC 27](#) at para 24.

<sup>33</sup> *Vancouver* at para. 29.

<sup>34</sup> *Vancouver* at para 28.

Parallels can certainly be drawn to the facts of the matter at hand, as the Crown's violations of the constitutionally derived fiduciary duties it owed to LSFN not only harmed LSFN, but the Crown-First Nations relationship as a whole. They impair First Nations confidence in the nation-to-nation relationship and diminish First Nations' faith in the efficacy of s. 35 protection.

32. The AFN submits that the lower Court's erred by failing to consider vindication as an adjunctive element of deterrence in its approach to equitable compensation. Instead of advancing a formulation of equitable compensation that promotes the reconciliation of the divergent interest of First Nations and the Crown, affirming the inherent values associated with s. 35, it undermined the nation-nation relationship and First Nations faith in the efficacy of s. 35 protections by historically reformulating the Crown's actions to that of lawful behaviour. This was accomplished via its imposition of a hypothetical expropriation of the land, despite recognizing that it lawfully remains "flooded Reserve lands".<sup>35</sup> Compounding these revisionist principles, it further implemented a retroactive flowage easement for the benefit of Canada.

33. The approach to relief via equitable compensation, which mandates that the claimant come before the court with "clean hands" to assuage itself of equitable principles<sup>36</sup>, should not focus on condoning or justifying the Crown's historical breaches of its fiduciary duty in weighing compensation. Instead, the AFN submits that the correct approach to equitable compensation reflects the award of an amount required to not only functionally serve the objects of compensation, but deter future breaches by Canada and vindicate the value of s.35 and the protections provided therein, while having regard to the impact of Canada's breaches on the LSFN and the egregiousness of Canada's conduct. The award must be appropriate and just, not only from the perspective of Canada, but the LSFN as well. Both equitable and legal principles support an interpretation of equitable compensation which favours the aggrieved party, being the LSFN. As noted by the appellant, this includes acknowledging the unique nature of their losses and the LSFN's relationship with their lands in light of its cultural importance.<sup>37</sup>

34. The element of deterrence and by association, vindication, are particularly important in light of Canada's conduct to the LSFN. Canada chose to leave the LSFN in the dark and make false assurances that there were no immediate plans to flood the Lands at issue. Further, Canada was

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<sup>35</sup> *FC's Reasons* at para 528.

<sup>36</sup> *2324702 Ontario v. 1305 Dundas*, [2019 ONSC 1885](#) at paras. 17-24.

<sup>37</sup> Factum of the Appellant at paras. 112.

aware of the detrimental effects to LSFN that would occur as a product of the flooding, advising of the “hardship and disaster” and “distress and anxiety” that the LSFN faced.<sup>38</sup> The honour of the Crown and reconciliation support condonation of these behaviours.

### **E. United Nations Declaration on the Rights of Indigenous Peoples**

35. The AFN submits that international discourse supports its assertion that the lower Courts incorrectly interpreted and applied the principles of equitable compensation. Rather, a progressive interpretation of the principles of equitable compensation is required to ensure that the constitutional principles of the honour of the Crown and reconciliation are met.

36. The *United Nations Declaration on the Rights of Indigenous Peoples*<sup>39</sup> has been described as the framework for reconciliation at all levels and across all sectors of Canadian society.<sup>40</sup> As reconciliation is the “fundamental objective of the modern law of aboriginal and treaty rights,” it is incumbent to consider the fundamental human rights principles associated therewith.<sup>41</sup>

37. Article 8(2)(b) of the *UN Declaration* provides that States shall provide an effective mechanism for the prevention of, and redress for any action which has the aim or effect of dispossessing First Nations of their lands, territories or resources.<sup>42</sup> Article 28(1) further provides that First Nations have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation for lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damages without their free, prior and informed consent. Article 28(2) further elaborates that compensation should take the form of lands, territories and resources equal in quality, size and legal status or monetary compensation or other appropriate address.<sup>43</sup>

38. With respect to acknowledging the scope of these international norms in the domestic sphere, it is clear that within the Canadian courts there is a presumption of conformity with Canada commitments to international law. In *R. v. Hape*, this Court affirmed that the judiciary should seek

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<sup>38</sup> *FC's Reasons* at para 157.

<sup>39</sup> [United Nations Declaration on the Rights of Indigenous Peoples](#), GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49 (2008) 15 [“*UN Declaration*”].

<sup>40</sup> “Introduction.” [Canada's Residential Schools: Reconciliation: The Final Report of the Truth and Reconciliation Commission of Canada, Volume 6](#), by Truth and Reconciliation Commission of Canada at p. 16.

<sup>41</sup> *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005 SCC 69](#) at para 1.

<sup>42</sup> *UN Declaration*, Article 8.

<sup>43</sup> *UN Declaration*, Article 28.

to ensure compliance with Canada's binding obligations under international law. In *Health Services and Support-Facilities Subsector Bargaining Association* this presumption was invoked in overturning previous decisions excluding collective bargaining as a right constitutionality protected by the *Charter*.<sup>44</sup>

39. The AFN submits that international discourse implies that the equitable compensation provided to the LSFN must represent a meaningful response to the seriousness of the Crown's breach, the objectives of compensation, upholding First Nations s. 35 values, and deterring future breaches.

#### **F. Conclusion**

40. The AFN submits that the modern evolution of the honour of the Crown; the associated constitutionally grounded fiduciary duty owed by the Crown to the LSFN, the role of s. 35 in the Canadian legal landscape including Canada's continued focus on reconciling the divergent interest of First Nations and the Crown; in addition to the domestic consideration and implementation of international norms, all support a finding that the lower Court's incorrectly interpreted the principles of equitable compensation.

41. As this misinterpretation is an error in law, the compensation awarded by the LSFN with respect to the Land at issue should be remitted to the Trial Court for reassessment. The compensation for the Lands at issue should have been based on their actual use for flooding purposes, versus hypothetical expropriation. Only by taking this approach can this Court ensure that the equitable compensation due to the LSFN conforms to the aforementioned equitable and constitutional principles, deters future improvident conduct by the Crown, and affirms the importance and value of First Nations inherent rights as recognized by s. 35 of the *Constitution Act, 1982*.

#### **PART IV – ORDER SOUGHT AND COSTS**

42. The AFN respectfully agrees with the Appellant's that the award of equitable compensation be remitted to the Trial Court for reassessment with the benefit of this Court's reasons and direction. The AFN does not seek costs and asks that no costs be awarded against it.

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<sup>44</sup> *R. v. Hape*, [2007 SCC 26](#), *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*, [2007 SCC 27](#) at para. 20.

ALL OF WHICH IS RESPECTFULLY SUBMITTED on November 18, 2020.



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